No. 91-122

In The

Supreme Court of the United States

October Term, 1991

PFZ PROPERTIES, INC.,

Petitioner,

v.

RODRIGUEZ, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER PFZ PROPERTIES, INC.

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioner PFZ Properties, Inc. Written consent to the filing of this brief has been granted by counsel for all parties. The consent letters have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation (PLF) is a California nonprofit corporation organized for the purpose of engaging in litigation that affects the public interest. Policy is set by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys.

PLF has participated in many cases involving land use and the Due Process Clause. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). PLF's public policy perspective and litigation experience in support of private property rights will provide a helpful additional viewpoint on the constitutional issues in the case at bar.

STATEMENT OF THE CASE

The facts recited by the Commonwealth of Puerto Rico are quite different from those alleged in the complaint filed by PFZ Properties, Inc. (PFZ). Since this case is on appeal from a dismissal of PFZ's complaint, its version of the facts must be accepted.

In 1976 the Planning Board of Puerto Rico gave preliminary approval for site-specific use designations and the subdividing of land PFZ owns in Vacia Talega. Petition for certiorari at 3. An environmental lawsuit by neighboring residents temporarily delayed PFZ from obtaining final approval of its plans. PFZ successfully concluded the suit in 1978 and promptly submitted final plans for Phase 1 of its project to the Regulations and

Permits Authority (ARPE). It took ARPE three years to review the plans. Finally, in 1981, ARPE gave final discretionary approval of a scaled-down version of the plans. *Id.* at 4.

In 1982 PFZ submitted construction drawings to ARPE for Phase 1. ARPE had a ministerial duty at that point to review the drawings for technical compliance with the building code and to issue building permits. *Id.* After four years, PFZ inquired by letter about the status of its construction drawings. ARPE did not answer. Two years later, the president of PFZ learned from a special advisor to the governor why its permit had not yet been issued. The governor had determined years earlier for personal and political reasons that PFZ's project should not go forward. *Id.* at 5. For this reason the administrator of ARPE, a political appointee of the governor, had instructed his staff to neither process PFZ's drawings, nor communicate with PFZ. *Id.* at 4.

PFZ filed this action in federal court for damages under 42 U.S.C. § 1983 alleging that ARPE's refusal to process the drawings was a violation of PFZ's right to due process. Defendants filed an answer and a motion to dismiss and sent PFZ a letter stating that the 1976 Planning Board approval and the 1981 ARPE approval had expired and PFZ would not receive its permits. PFZ appealed ARPE's decision both administratively and in the commonwealth courts without success prior to further pursuing its federal action. *Id.* at 6.

When PFZ returned to federal court, however, the District Court dismissed PFZ's complaint. The First Circuit affirmed the dismissal, ruling that PFZ had stated a

claim for neither procedural nor substantive due process. In ruling on PFZ's substantive due process claim, the First Circuit relied on a test which is inconsistent with this Court's formulations for substantive due process violations. This unique test is contrary to sound public policy and has the effect of turning away a potentially valid claim, thus denying PFZ its day in court.

SUMMARY OF ARGUMENT

The First Circuit's theory of what constitutes a violation of substantive due process and this Court's pronouncements on that subject are irreconcilable. The First Circuit operates from a presumption that even bad faith, illegal denials of building permits "do not ordinarily implicate substantive due process." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991). This Court, however, makes no distinction between deprivations of land use entitlements and other sorts of entitlements. Moreover, this Court has never said that deliberate lawbreaking by government officials for the purpose of depriving an individual of his property rights is an insufficient ground for a due process claim. On the contrary, this Court has found the Due Process Clause offended where government action is arbitrary or not rationally related to a permissible state objective. The First Circuit's addition of a requirement that government action also be " 'for purposes of oppression,' or [an] 'abuse of government power that shocks the conscience' " (*id.* at 31) simply invites government officials to deliberately break the law.

Deliberate government lawbreaking is intolerable in a society governed by law. In fact, early understandings of the due process guaranty show that its very purpose was to force the government to obey the law.

The First Circuit's additional test springs from a fear that "[v]irtually every alleged . . . error of a local planning authority . . . could be brought to a federal court." *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831 (1st Cir. 1982). The First Circuit's fear is unfounded and its added test is unnecessary because this Court's existing rules regarding the pleading of constitutional claims in general and, in particular, due process claims involving development proposals, adequately screen out cases involving trivial mistakes in the processing of land use applications. These rules include this Court's requirement that such a case be "ripe," the requirement of scienter in due process cases, and the rule against rendering advisory opinions.

ARGUMENT

I

GOVERNMENT ACCORDS SUBSTANTIVE DUE PROCESS WHEN ITS ACTS ARE RATIONALLY RELATED TO A PERMISSIBLE STATE OBJECTIVE

As distinguished from its procedural cousin, substantive due process focuses on what the government has done, as opposed to how and when the government did it. To satisfy procedural due process, generally speaking,

the government must not deprive a person of an entitlement without some sort of notice and a chance to be heard. To satisfy substantive due process, on the other hand, the government must have a legitimate reason for taking away the entitlement, regardless of what procedures it provides to accomplish the deprivation. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). A legitimate reason is one that is not arbitrary or capricious, but is rationally related to accomplishing a permissible state objective. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977).

Although the court below opined that "refusals to issue building permits do not ordinarily implicate substantive due process" (928 F.2d at 31), this Court has not distinguished the deprivation of land use entitlements from other sorts of entitlements. *See, e.g., Pennell v. City of San Jose*, 485 U.S. at 11 (ordinance regulating what rent a property owner can charge); *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) (act regulating the use of land for surface mining); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (statute requiring oil refiners to discontinue operating retail stations on land developed for that use); *Moore v. City of East Cleveland*, 431 U.S. at 498 (ordinance regulating the occupancy of single dwelling units); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976) (zoning ordinance); *Nectow v. City of Cambridge*, 277 U.S. 185, 187-88 (1928) (zoning ordinance); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinance).

In all these cases this Court analyzed the substantive due process requirement in terms of whether the government had acted to deprive a property owner of a property right for arbitrary reasons or for reasons that were not

rationally related to a permissible state objective. Amicus is aware of no instance where this Court has elevated the plaintiff's burden in a due process case to something beyond this familiar test.

II

THE DECISION BELOW INVITES DELIBERATE GOVERNMENT LAWBREAKING

The First Circuit assumed that ARPE "arbitrarily or capriciously refused to process [PFZ's] approved construction drawings." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d at 31. The court also assumed that in so doing ARPE "violated state law" and "failed to comply with agency regulations or practices." *Id.* at 32. The court further assumed that ARPE "engaged in delaying tactics and refused to issue permits . . . based on considerations outside the scope of its jurisdiction." *Id.* The court even assumed that these unlawful acts "injured [PFZ's] property." *Id.* at 31.

Despite having accepted as true PFZ's allegations that ARPE was guilty of intentionally breaking the law and singling PFZ out for different treatment based on improper motives, thus injuring its property, the Court of Appeals nonetheless affirmed the dismissal of PFZ's substantive due process claim. As support for its action, the Court of Appeals made this astonishing statement:

> "Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. . . . The doctrine of substantive due process 'does not protect

> individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational." ' " *Id.* (citations omitted).

The court goes on to define "legally irrational" in such a way that governmental lawbreaking, if done in pursuit of an otherwise legitimate state interest, is not legally irrational. *Id.* at 31-32.

Further on, the court remarks that " 'even bad faith violations of state law are not necessarily tantamount to unconstitutional deprivations of due process.' " *Id.* (quoting *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990)). The court reiterates this view at another point with even greater conviction: " 'A mere bad faith refusal to follow state law . . . simply does not amount to a deprivation of due process.' " *Id.* at 32 (quoting *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983)). In the case quoted, *Chiplin Enterprises*, the owner's application was processed, his permit was issued, and a state court remedy was available to correct the city's procedural error. By contrast, PFZ's application was not processed, its permit was denied, and the commonwealth courts denied PFZ a remedy. Thus, in PFZ's case, the federal court has abdicated its role as a last line of defense between the American citizen and political corruption.

If the First Circuit's view prevails, politicians will readily conclude that the laws they pass are applicable only to the taxpayers, not to themselves. Bureaucrats will

know that the regulations they promulgate are applicable only to the property owners, not to themselves. The disincentive against "bad faith violations of state law" by government when dealing with its citizenry will be gone.

III

DELIBERATE GOVERNMENT LAWBREAKING IS INTOLERABLE IN A SOCIETY GOVERNED BY LAW

In attempting to define the guaranty of due process, this Court has described it as a "requirement of 'fundamental fairness' " (*Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981)), or "fair play" (*International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). It has also been described as a social contract under which the rights of individuals and the limits of the power of government are defined. *In re Gault*, 387 U.S. 1, 20 (1967).

Whatever else may be the source of the terms of that social contract, courts must at least be able to look to the laws of the state. The concept of due process had its origins in the Magna Carta as a protection to individuals against arbitrary departures by the Crown from the "law of the land." Daniel Webster, in his well-known definition of the phrase in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), said: "The meaning is, that every citizen shall hold life, liberty, property, and immunities under the protection of the general rules which govern society." *Id.* at 581. Due process, then, at the very least requires those holding public office to administer the law impartially and not deliberately violate the law

themselves. *Daniels v. Williams*, 474 U.S. at 331 ("[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original)).

In the case at bar, PFZ has alleged that politically motivated governmental officials deliberately refused to follow the law regarding the timely processing of land use applications and the ministerial granting of permits. It is alleged that PFZ was singled out for this treatment because these officials wanted to deprive PFZ of a property right he obtained years earlier.

Whether looking back to Daniel Webster's formulation of due process as impartial protection under the general laws that govern society, or to *International Shoe*'s notion of fair play, or to the modern terminology requiring that government acts be in furtherance of permissible purposes, PFZ has adequately pled the violation of its right to due process.

IV

THE FIRST CIRCUIT'S UNIQUE TEST IS UNNECESSARY BECAUSE EXISTING RULES ADEQUATELY SCREEN OUT CASES INVOLVING PETTY PROCEDURAL MISTAKES

The First Circuit's "shock the conscience" test for due process claims appears to originate in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822. In that case a town planning board denied a developer's subdivision plan. The developer and the board had disagreements over the

adequacy of an environmental document and a town ordinance regarding the configuration of lot lines. In the court's words, the disagreements were "typical of the run of the mill dispute between a developer and a town planning agency." *Id.* at 833. The developer brought suit in federal court under the Civil Rights Act asserting, among other things, that the board was interpreting its laws too liberally, causing a violation of the developer's right to due process. *Id.* at 831.

The Court of Appeals expressed concern that if it heard the case, "[v]irtually every alleged legal or procedural error of a local planning authority . . . could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process." *Id.* After all, the court noted: "*Every* appeal by a disappointed developer . . . necessarily involves some claim that the board exceeded [or] abused . . . its legal authority in some manner." *Id.* at 833 (emphasis in original). Based on this concern, the court affirmed the grant of summary judgment against the developer. To drive its point home, the court stated in a footnote, "even if it could here be shown that the Board members strayed wilfully from 'the proper ends of their governmental duties,' their digression was not of 'constitutional proportions.' " *Id.* at 832 n.9.

This idea that a little official lawbreaking is acceptable, so long as it does not reach "constitutional proportions," was picked up in later First Circuit cases as a requirement that the illegal acts of governmental officials

must shock the court's conscience or the plaintiff's case will be thrown out of court.[1]

The court's concern in *Creative Environments* reflects some legitimate considerations. The Civil Rights Act and the federal courts were not meant to be a fountain of tort damages for every petty mistake made in the processing of development proposals. But existing pronouncements of this Court are adequate to screen out such cases; it was unnecessary for the First Circuit to erect another, unsportingly high, hurdle.

For example, this Court already requires cases involving development proposals to reach a state of "ripeness" before filing in federal court. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985) ("whether we examine the Planning Commission's application of its regulations under Fifth Amendment 'taking' jurisprudence, or under the precept of due process, we conclude that respondent's claim is premature"). Ripeness requires a final decision by the agency as to how it will apply its regulations to the subject property. While PFZ's case is ripe, it is questionable whether the *Creative Environments* case was.

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[1] *Pittsley v. Warish*, 927 F.2d 3, 6-7 (1st Cir. 1991), purports to derive the shock the conscience test from this Court's decision in *Rochin v. California*, 342 U.S. 165, 169 (1952). In *Rochin*, the conduct of police officers who pumped a man's stomach against his will was said to shock the conscience. The Court did not, however, hold that the Due Process Clause was relegated solely to situations which shock the conscience. Indeed the Court repeatedly emphasized that the test is a far more general one. *See, e.g., id.* at 169, 173.

This Court also requires scienter before a due process claim can be stated. It is not enough for a governmental official to accidentally or unknowingly overstep his legal boundaries, he must do it with an intent to break the law and deprive the plaintiff of some liberty or property right. *Daniels v. Williams*, 474 U.S. at 330-32; *Paul v. Davis*, 424 U.S. 693, 700-01 (1976). Many cases involving trivial mistakes in the processing of development proposals will not pass this filter.

Yet another rule of this Court which will turn away many typical permit denials, and which should have prevented *Creative Environments* from getting as far as it did, is the rule that federal courts will not issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In *Creative Environments*, the developer's due process claim was aimed at only two alleged reasons for denying the subdivision plan. The developer did not dispute, however, that "at least several" other valid, independent reasons were given by the board for denying its proposal. 680 F.2d at 830-31. Since a decision in the developer's favor therefore would not have required reversal of the board's action, the "federal question" which allegedly invoked federal court jurisdiction was nothing more than a disallowed request for an advisory opinion.

Where a case does clear all these hurdles, it is probably no longer a "run of the mill dispute between a developer and a town planning agency" (*id.* at 833) which should be steered toward the state courts.

The case at bar is no run of the mill case. Having cleared this Court's hurdles, and having stated a valid due process claim, PFZ deserves to have its day in court.

Instead, PFZ was turned away because of the First Circuit's extra test requiring some subjective shock to the conscience of the judge the parties happen to draw. This extra test is unfair and unnecessary and should be expressly overruled along with the reversal of the decision below.

CONCLUSION

It was error for the court below to dismiss PFZ's complaint. The facts alleged regarding the actions of ARPE officials and the inaction of the commonwealth courts state a valid claim under the decisions of this Court that PFZ's right to due process of law was violated. PFZ should have the opportunity to prove its allegations and its damages. The First Circuit's shock the conscience test should be overruled and the decision below reversed.

DATED: December, 1991.

Respectfully submitted,

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